



FEDERAL MARITIME COMMISSION

46 CFR Part 531

Docket No. 12-05

Non-Vessel-Operating Common Carrier Service Arrangements

AGENCY: Federal Maritime Commission.

ACTION: Notice of Inquiry.

SUMMARY: The Federal Maritime Commission is issuing this Notice of Inquiry seeking comments on its rules which exempt non-vessel-operating common carriers who enter into service arrangements from certain tariff filing requirements of the Shipping Act of 1984.

DATES: Comments are due on or before June 18, 2012.

ADDRESSES: Submit comments to:

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

or e-mail non-confidential comments to: Secretary@fmc.gov
(e-mail comments as attachments preferably in Microsoft Word or PDF)

FOR FURTHER INFORMATION CONTACT:

Karen V. Gregory, Secretary
Federal Maritime Commission
800 N. Capitol Street, N.W.
Washington, D.C. 20573-0001
Phone: (202) 523-5725
Fax: (202) 523-0014
Email: Secretary@fmc.gov

Rebecca A. Fenneman, General Counsel

Federal Maritime Commission
800 N. Capitol Street, N.W.
Washington, DC 20573-0001
(202) 523-5740
Fax (202) 523-5738
Email: GeneralCounsel@fmc.gov

SUPPLEMENTARY INFORMATION:

Background:

In December 2004, the Commission issued a final rule exempting¹ non-vessel-operating common carriers (NVOCCs) who enter into NVOCC service arrangements (NSAs) from certain tariff requirements of the Shipping Act of 1984 (Act).² The rule allows NVOCCs to enter into NSAs with their customers in lieu of publishing those arrangements in a publicly-available tariff, as otherwise would be required by Sections 8(a) and 10 of the Shipping Act. In the preamble to the final rule, the Commission stated that it would continue to consider how it could remove limitations on shipper participation while ensuring that the criteria of Section 16 were met. 69 FR 75850, 75852 (December 20, 2004).

The ability of two or more unaffiliated NVOCCs to jointly offer NSAs was not included in Part 531, in part due to ongoing litigation that included arguments on whether two or more

¹ Section 16 of the Shipping Act grants the Commission the authority to make rules exempting regulated entities from the requirements of the Shipping Act if it finds such an exemption will not result in substantial reduction in competition or detriment to commerce. 46 U.S.C. § 40103. The Commission must make an affirmative finding, based on information gathered in a public record, that these adverse consequences will not result from any exemption it may grant.

² 46 C.F.R. Part 531. The Commission's rules provide that an NSA means a written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC or two or more affiliated NVOCCs, in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. 46 C.F.R. § 531.3(p). An NSA shipper is a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, a shippers' association, or a non-vessel-operating common carrier. 46 C.F.R. § 531.3(o). Specifically, the exemption allows individual NVOCCs (including corporately affiliated NVOCCs), who are compliant with the other requirements of the Shipping Act and the FMC's regulations at 46 C.F.R. Part 515 and 46 C.F.R. Part 520, to enter into an NSA with one or more NSA shippers. 46 C.F.R. § 531.2.

NVOCCs acting concertedly in NSAs were immune from the prohibitions of the antitrust laws. See United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502 (4th Cir. 2005), cert. denied, 547 U.S. 1002 (2006).³ The ruling in the Gosselin case alleviated the Commission's concerns that NVOCCs acting jointly through NSAs would create a potential for reduction in competition through immunity from the antitrust laws. In August 2005, the Commission issued a notice of inquiry to consider expanding the exemption provided for in 46 CFR part 531 to enable two or more unaffiliated NVOCCs to jointly offer NSAs.⁴ Commenters were given until October 20, 2005, to address a set of questions designed to provide information and perspectives on the likely impact of joint NSA authority.⁵

In its Plan for Retrospective Review of Existing Rules, published on November 4, 2011, the Commission announced its intention to conduct a full review of Part 531, governing NSAs, no later than 2013. The purpose of the review is to determine whether the NSA regulations should be modified, streamlined, expanded, or repealed to make them more effective or less

³ Gosselin World Wide Moving, N.V. and The Pasha Group, involved in the shipping of household goods of American military personnel to and from Europe, were accused of bid rigging in violation of the Sherman Act. They argued, and the district court agreed, that they had antitrust immunity based on three provisions of the Shipping Act: 1) 46 U.S.C. app. § 1706(a)(4), now 46 U.S.C. § 40307(a)(5); 2) 46 U.S.C. app. § 1706(a)(2), now 46 U.S.C. § 40307(a)(3); and 3) 46 U.S.C. app. § 1706 (c)(1), now 46 U.S.C. § 40307(c). On cross appeals, the Fourth Circuit rejected the district court's findings and the companies' arguments. First, the court found that the parties' behavior did not solely concern a foreign inland segment as required by 46 U.S.C. § 40307(a)(5). The court rejected the argument that United States v. Tucor Int'l, Inc., involving shipments of household goods belonging to military personnel from U.S. military bases in the Philippines to Filipino seaports, was analogous. See United States v. Tucor Int'l, Inc., 35 F. Supp. 2d 1172 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999). Second, the court found it was not reasonable for the companies to rely on 46 C.F.R. § 520.13(c) to believe their collusive behavior was exempt from the antitrust laws. Finally, the court rejected the argument that an adverse determination on the two grounds for statutory immunity discussed above constituted a denial or removal such that any penalty could only be imposed prospectively. The court also stated that exceptions to federal antitrust laws should be construed narrowly. See also In re Household Goods Movers Antitrust Litigation, 2009 WL 8234043 (D.S.C. Sep. 10, 2009); U.S. v. Daily Gazette, 567 F. Supp 2d 859, 871 (S.D.W.Va. 2008) (following Gosselin).

⁴ Docket No. 05-06, 70 Fed. Reg. 52345 (September 2, 2005).

⁵ The Commission received comments from: the United States Department of Justice ("DOJ"); the United States Department of Transportation ("DOT"); the World Shipping Council ("WSC"); the International Trade Surety Association ("ITSA"); and Joint Comments of the National Industrial Transportation League, United Parcel Service, Inc., FEDEX Trade Networks Transport & Brokerage, Inc., Transportation Intermediaries Association, North Atlantic Alliance Association, Inc., and the Agriculture Ocean Transportation Coalition ("Joint commenters"). All comments were supportive of expanding the exemption to enable two or more unaffiliated NVOCCs to jointly offer NSAs.

burdensome. The Commission considered action on Docket No. 05-06 at its December 8, 2011 meeting. On April 12, 2012, the Commission issued an order discontinuing Docket No. 05-06, citing its intention to conduct a full review of its regulations contained in Part 531 governing NSAs, in accordance with its Plan for Retrospective Review of Existing Rules.

Accordingly, the Commission now invites comment and information from all members of the interested public (whether they be located in the United States or elsewhere), including ocean common carriers, ocean transportation intermediaries, exporters, and beneficial cargo owners, on ways to improve or change Part 531. The Commission specifically requests comments and current information on (1) extending the exemption to allow two or more unaffiliated NVOCCs to jointly offer NSAs, and (2) how to make the NSA rules less burdensome and more effective in achieving the objectives of the Shipping Act. Comments that are specific and provide supporting data are most helpful.

Submit Comments:

Non-confidential filings may be submitted in hard copy or by e-mail as an attachment (preferably in Microsoft Word or PDF) addressed to secretary@fmc.gov on or before June 18, 2012. Include in the subject line: “NSAs – Response to NOI.” Confidential filings must be submitted in the traditional manner on paper, rather than by email. Comments submitted that seek confidential treatment must be submitted in hard copy by U.S. mail or courier. Confidential filings must be accompanied by a transmittal letter that identifies the filing as “confidential” and describes the nature and extent of the confidential treatment requested. When submitting comments in response to the Notice of Inquiry that contain confidential information, the confidential copy of the filing must consist of the complete filing and be marked by the filer as “Confidential-Restricted,” with the confidential material clearly marked on each page. When a

confidential filing is submitted, an original and one additional copy of the public version of the filing must be submitted. The public version of the filing should exclude confidential materials, and be clearly marked on each affected page, "confidential materials excluded." The Commission will provide confidential treatment to the extent allowed by law for those submissions, or parts of submissions, for which confidential treatment is requested. Questions regarding filing or treatment of confidential responses to this Notice of Inquiry should be directed to the Commission's Secretary, Karen V. Gregory, at the telephone number or e-mail provided above.

By the Commission.

Karen V. Gregory
Secretary

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